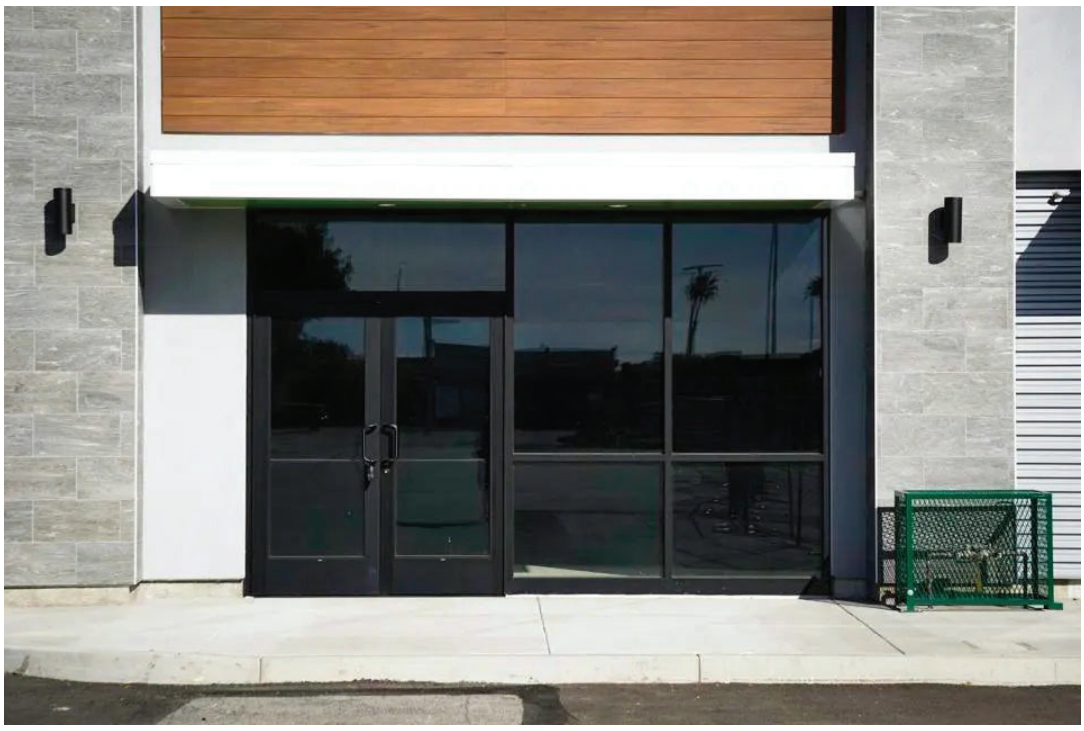
BETA

FORBES > REAL ESTATE

A New York City Law May Punish Commercial Landlords Who Behave Badly

Joshua Stein Contributor
I write about commercial real estate negotiations, deals and legal issues.

Oct 19, 2023, 10:00am EDT



When can a New York City commercial tenant claim harassment by a landlord? GETTY

In any commercial lease, one major issue relates to the work that needs to be done to prepare a space for the tenant's occupancy. Usually, the landlord will deliver the space pretty much as is, or

with certain limited work completed. Then it's up to the tenant to build out the space so it meets their needs.

BETA

In that process, the tenant wants to make sure it can change its plans if necessary as it rethinks how it will use the space. At the same time, the landlord wants to make sure the tenant doesn't do anything crazy.

To resolve these conflicting concerns, the landlord will often pre-approve any of the tenant's plans that are far enough along to be approved when the lease is signed. If the tenant wants to change anything, the tenant might need to go back to the landlord and get approval of the change.

Usually the landlord agrees to be "reasonable" about approving the tenant's change. That basically means the landlord must approve it if an ordinary landlord in the same position—with no particular axe to grind or weird idiosyncratic agenda—would approve it.

Sometimes, though, the lease will say the landlord can withhold its consent "in Landlord's sole and absolute discretion." That language might suggest that the landlord could always disapprove anything and everything, with no obligation to be "reasonable," thus preventing the tenant from making any changes at all.



A pending New York City litigation suggests that a landlord can't act quite as unreasonably as a lease might seem to allow. In that litigation, the lease said the landlord could disapprove plan changes in its sole and absolute discretion. The landlord apparently used that authority to disapprove practically everything the tenant ever wanted to change.

BETA



Finally, the landlord came up with a new and different plan for the tenant's work, which would have cost twice as much as the tenant's original budget. Implicitly or explicitly, it became clear the landlord wouldn't approve anything except the landlord's new and different (and very expensive) plan. Eventually the landlord required the tenant to stop work.

The tenant sued the landlord on various grounds, including based on a New York City law that prohibits "harassment" of commercial tenants. That law defines "commercial tenant harassment" with incredible breadth: it's anything a landlord does or doesn't do that "would reasonably cause a commercial tenant to vacate." The law then lists some examples, including any "repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant's business."

The court had little trouble concluding that the landlord's repeated disapprovals, if adequately proven, would constitute commercial tenant harassment because they continued over time and prevented

the tenant from opening and operating its business. Eventually, they would lead the tenant to vacate the leased space. So the litigation proceeded, with the possibility that (among other things) a court might order the landlord to behave better.

BETA

Moral of the story: in New York City, at least, if a lease says that a landlord can act unreasonably, or disapprove things in its sole and absolute discretion, the landlord shouldn't necessarily believe it. That principle could apply to much more than approval of changes in the tenant's construction plans. For example, if a tenant wanted to sell its business but a mean landlord disapproved a whole series of reasonable purchasers that the tenant proposed, could the tenant claim "commercial tenant harassment"?

Other cases make it clear, however, that ordinary one-off disagreements about a lease or a tenant's activities don't rise to "commercial tenant harassment." The New York City law also says a landlord's efforts to collect rent and enforce its remedies for nonpayment don't constitute harassment. Finally, a tenant typically cannot recover more than $50,000 from a landlord guilty of "commercial tenant harassment." Therefore, tenants shouldn't necessarily rejoice over having an all-purpose weapon for use against landlords.

The writer tips his hat to Michelle Maratto Itkowitz for bringing this case to his attention.



Joshua Stein

Copyright © 2023 Joshua Stein.
Published on Forbes.com October 19, 2023.

I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don't. It's important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books

on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals.

BETA